



February 13, 2001

Mr. Jerome H. Supple  
President  
Southwest Texas State University  
601 University Drive  
San Marcos, Texas 78666-4615

OR2001-0534

Dear Mr. Supple:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144327.

Southwest Texas State University (the "university") received a request on December 1, 2000 for phone records of the biology department and information pertaining to a specified report. The university received a second request on December 3, 2000 from the same requestor for fourteen enumerated items including evaluations, reprimands, and personnel files of a specified biology department employee, as well as phone records, purchase orders, and receipts relating to the employee. The requestor also asks for information pertaining to three specified professors' research grants, records of graduate student teaching assignments, communications between various specified individuals, and copies of the biology department's budget and expenditures from September 1999 through the present. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.

Section 552.301(e)(1)(D) of the Government Code provides that a governmental body must submit a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested. You state that "because the number of records is voluminous, we enclose a representative sample." You have submitted one document as your representative sample. If each requested document contains substantially different types of information, you must submit to this office copies of all of the documents or information. *See* Open Records Decision No. 499 (1988), 497 (1988). Based on our review of the submitted document and the request, we conclude that the submitted document is not truly representative of the requested records as a whole.

To the extent the university holds information that is responsive to the request but that is not represented by the submitted sample, the university has failed to comply with section 552.301(e)(1)(D) of the Government Code. Accordingly, such information is “presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” *See* Gov’t Code § 552.302. You have not demonstrated a compelling reason to withhold any of the information at issue. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body’s position in litigation and does not itself make information confidential). Therefore, to the extent the university holds information that is responsive to the request but that is not represented by the submitted sample, the university must release such information to the requestor pursuant to section 552.302 of the Government Code.

We next address the section 552.103 assertion with respect to the responsive information for which the submitted sample is truly representative. Section 552.103(a) provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov’t Code § 552.103(c).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You have provided an affidavit of a university attorney who states that he spoke to the requestor’s attorney on December 5, 2000 and that the attorney stated that he intended to file suit against a university employee in the next few days. Further, you have provided a copy of an original petition filed by the attorney against the university employee on January 10, 2001. Pursuant to section 552.103(c), litigation must be reasonably anticipated

or pending on the date that the governmental body received the request for information. The university received the requests on December 1, 2000 and December 3, 2000. Thus, we cannot consider the December 5, 2000 phone call or the lawsuit filed on January 10, 2001 in determining whether you have demonstrated reasonably anticipated or pending litigation. Accordingly, we conclude that the university has not demonstrated that litigation was reasonably anticipated or pending on December 1, 2000 or December 3, 2000. Therefore, you may not withhold the information under section 552.103.

In conclusion, the university must release to the requestor, in its entirety, the information responsive to the request.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

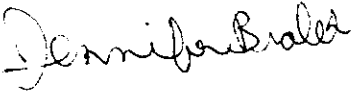
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Bialek".

Jennifer H. Bialek  
Assistant Attorney General  
Open Records Division

JHB/er

Ref: ID# 144327

Encl: Submitted documents

cc: Mr. Randy Stephens  
1350 N. L.B.J. Drive, #1434  
San Marcos, Texas 78666  
(w/o enclosures)